LIM AH MOI

v.

AMS PERIASAMY SUPPIAH PILLAY

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABU MANSOR ALI JCA
DENIS ONG JCA
[CIVIL APPEAL NO: A-2-641-1995]
13 MAY 1997

CONTRACT: *Breach - Rescission, right of - Election to rescind agreement - Whether appellant bound by such election - Whether appellant still has caveatable interest in the land after rescinding the agreement - Whether appellant's caveat should remain or be removed*

LAND LAW: *Sale of land - Caveat - Timeous action - Whether important - Whether vital that claims made by caveator are enforced by action without undue delay*

The appellant had earlier entered into a sale and purchase agreement ('the agreement') with a vendor ('the vendor') in respect of a piece of land ('the land') of which the respondent was the registered proprietor. Thereafter, the appellant entered a conveyancing *caveat* ('the *caveat*') against the title to the land. Subsequently, the vendor wrote to the appellant informing the latter that the area of the land available for transfer was not 5.5 acres as stated in the agreement but 4.28 acres only. The appellant responded by letter ('Letter 2') demanding, *inter alia*, the refund of his deposit of RM10,000 together with interests. Thereafter, the vendor replied by letter stating that he had completed arrangements with the respondent to transfer the land (5.5 acres) to the appellant. After that, the appellant obtained an *ex parte* order extending the *caveat* pursuant to s. 326(2) of the National Land Code 1965 ('the Code').

Subsequently, the appellant filed a writ for specific performance and ancillary relief. In the meanwhile, the respondent applied to remove the *caveat*. The learned Judge acceded to the respondent's application and directed the removal of the *caveat* for the following reasons: (i) the appellant had no caveatable interest in the land as he had given up his rights by electing to rescind the agreement *via* Letter 2; and (ii) the appellant had not acted timeously in enforcing his claim by way of an action in Court.

Held:
Per Gopal Sri Ram JCA

[1] An innocent party against whom a contract is repudiated may either accept the repudiation and sue for damages **or** he may treat the contract as continuing and sue for specific performance. These two alternatives are embodied in s. 40 of the Contracts Act 1950 ('the Act').

[1a] However, a third option is yet available to the innocent party. It is the common law right of **rescission**, akin to but much narrower than its equitable counterpart.

[1b] In the present case, the appellant had clearly made an election to rescind the agreement (*via* Letter 2 demanding the refund of his deposit of RM10,000). The appellant was, in fact, asking for a restoration of the *status quo ante*. Consequently, the appellant was bound by the election that he had made, and the learned Judge was right in holding that the appellant had no caveatable interest in the land within s. 323 of the Code.

[2] It is well settled that a *caveat* acts as a statutory injunction which fetters a registered proprietor from dealing with his property and exercising all the rights conferred upon him by the Code. Because of its far reaching effect, it is vital that claims made by a caveator are enforced by action without undue delay.

[2a] In the present case, once the vendor signified that he was not in a position to honour the agreement, the appellant's rights crystallised in the sense of the election he was entitled to make.

[3] A proper reading of s. 327 of the Code makes it clear that a Court hearing an application to remove a caveat is very much concerned with the justice of the case. The process involves a balancing of competing considerations and an evaluation of the evidence and the facts of each particular case until the balance conclusively shifts in one direction or the other.

[4] In all appeals against the exercise of discretion, the initial role of the Court of Appeal is one of review only. The burden lies upon the appellant to demonstrate convincingly that the Judge to whom the law entrusts the primary exercise of the discretion has erred in principle or has taken into account or failed to take into account relevant considerations or has asked himself the wrong questions.

[Appellant's appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

***KONTRAK:** Kemungkiran - Pembatalan, hak untuk - Pilihan untuk membatal perjanjian - Samada perayu terikat dengan pilihan sedemikian - Samada perayu masih mempunyai kepentingan berkaveat dalam tanah selepas membatalkan perjanjian - Samada kaveat perayu patut terus wujud atau patut disingkirkan*

***UNDANG-UNDANG TANAH:** Penjualan tanah - Kaveat - Kecepatan tindakan - Samada penting - Samada sangat penting bagi tuntutan pengkaveat dilaksanakan melalui tindakan tanpa lengah*

Perayu sebelum ini telah memeterai satu perjanjian jual beli ('perjanjian') dengan penjual ('penjual') berhubung dengan sebidang tanah ('tanah') yang dimiliki oleh responden. Selepas itu, perayu telah memasukkan satu kaveat conveyencing ('kaveat') terhadap hakmilik tanah tersebut. Berikutnya, penjual menulis kepada perayu memberitahu perayu bahawa luas kawasan tanah yang tersedia untuk pindah milik bukanlah 5.5 ekar seperti yang tertera dalam perjanjian tetapi hanyalah 4.28 ekar. Perayu menjawab melalui surat ('surat 2') menuntut, antara lain, pembayaran balik depositnya berjumlah RM10,000 beserta dengan faedah. Penjual kemudiannya membalas melalui surat bahawa beliau telah pun menyempurnakan urusan dengan responden untuk memindahmilik tanah tersebut (5.5 ekar) kepada perayu. Perayu selepas itu memperolehi perintah *ex parte* melanjutkan kaveatnya di bawah s. 326(2) Kanun Tanah Negara 1965 ('Kanun').

Berikutnya, perayu telah memfailkan writ untuk pelaksanaan spesifik dan relif berbangkit. Sementara itu, responden telah memohon untuk menyingkirkan kaveat. Hakim yang bijaksana membenarkan permohonan responden dan memerintahkan supaya kaveat disingkirkan atas alasan-alasan berikut: (i) perayu tidak mempunyai kepentingan untuk dikaveat dalam tanah oleh kerana beliau telah pun melupuskan hak-haknya apabila beliau membatalkan perjanjian melalui surat 2; dan (ii) perayu tidak bertindak dengan cepat dalam melaksanakan tuntutan melalui tindakan guaman di Mahkamah.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Pihak yang tidak bersalah terhadap siapa sesuatu kontrak itu telah ditolak boleh memilih samada untuk menerima penolakan tersebut dan menuntut gantirugi **atau** menganggap kontrak tersebut sebagai terus wujud dan menuntuk pelaksanaan spesifik. Kedua-dua pilihan ini termaktub dalam s. 40 Akta Kontrak 1950 ('Akta').

[1a] Bagaimanapun, pilihan ketiga adalah juga terbuka kepada pihak yang tidak bersalah tersebut. Pilihan tersebut ialah hak **pembatalan** di sisi common law, yang mana adalah seakan-akan menyerupai tetapi lebih sempit dari hak equiti penolakan.

[1b] Dalam kes semasa, perayu jelas telah membuat pilihan untuk membatalkan perjanjian (melalui surat 2 menuntut pembayaran balik deposit berjumlah RM10,000). Pada hakikatnya perayu menuntut untuk pengekalan *status quo ante*. Oleh hal yang demikian, perayu adalah tertakluk kepada pilihan yang telah dibuatnya, dan Hakim yang bijaksana adalah betul bilamana memutuskan bahawa perayu tidak mempunyai kepentingan untuk dikaveatkan dalam tanah tersebut dalam maksud s. 323 Kanun.

[2] Ianya adalah sesuatu yang sudah lama diterima bahawa kaveat bertindak sebagai injunksi statutori yang menghalang pemilik berdaftar dari berurusan dengan hartanah dan dari melaksanakan hak yang diberi kepadanya oleh Kanun. Disebabkan oleh kesannya yang jauh menjangkau itu, adalah penting bahawa tuntutan pengkaveat tersebut dilaksanakan tanpa berlengah melalui tindakan guaman.

[2a] Dalam kes semasa, sebaik saja penjual memberi tanda bahawa beliau tidak berada dalam keadaan yang membolehkannya menghormati perjanjian, hak perayu dengan sendirinya menjadi matang dalam konteks pilihan yang boleh dibuat olehnya.

[3] Membaca dengan wajar s. 327 Kanun menunjukkan dengan jelas bahawa Mahkamah ketika mendengar permohonan untuk menyingkirkan kaveat adalah berhadapan dengan persoalan keimbangan keadilan kes. Proses ini melibatkan pengimbangan kepentingan-kepentingan yang bertentangan serta penilaian keterangan dan fakta sesuatu kes sehinggalah imbangan tersebut mengunjur secara muktamadnya kepada salah satu arah.

[4] Dalam kesemua rayuan terhadap penguatkuasaan budibicara, tugas awal Mahkamah Rayuan hanyalah untuk menyemak sahaja. Bebannya adalah terletak ke atas perayu untuk menunjukkan dengan yakin bahawa Hakim yang ditugaskan untuk menguatkuasakan budibicara telah tersilap dari segi prinsip atau telah mengambil kira atau gagal mengambil kira pertimbangan-pertimbangan yang relevan ataupun telah bertanyakan soalan-soalan yang salah.

[Rayuan perayu ditolak.]

Cases referred to:
Sargent v. A.S.L. Developments Ltd [1974] 131 CLR 634 ***(foll)***
Eng Mee Yong & Ors v. Letchumanan [1979] 2 MLJ 212 ***(refd)***
Teo Ai Choo v. Leong Sze Hian [1982] 2 MLJ 12 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 40
National Land Code 1965, ss. 323, 326(2), 327

[Appeal from High Court Malaya, Ipoh; Originating Summons No: 24-358-89]

For the appellant - Gurubachan Singh; M/s. Bachan & Kartar
For the respondent - V Vijaya Segeran; M/s. Maxwell Kenion, Cowdy & Jones

JUDGMENT

Gopal Sri Ram JCA:

As long ago as February 1983, the appellant and one Tan Hee Thai entered into a sale and purchase agreement in respect of a piece of land in Tapah of which the respondent is the registered proprietor. Soon after the execution of this agreement on 8 June 1984, the appellant entered a caveat against the title to the land to protect his interest pending completion. It is what the profession calls a conveyancing caveat. Such a caveat is entered, not in anticipation of any litigation, but merely pending conveyance and transfer of the property which forms the subject matter of the sale.

On 31 July 1986, the vendor, Tan Hee Thai, through his solicitors, wrote to the appellant's solicitors informing them that the area of the land available for transfer was not 5.5 acres as stated in the sale and purchase agreement but only 4.28 acres. The appellant took exception to this information. On 8 August 1986, his solicitors responded by a letter the contents of which are so important that I consider their reproduction here vital. This is what the letter says:

> Messrs. A.S. Yeo & Co.,
> Advocates and Solicitors,
> No. 9, Jalan Bandar Raya,
> (Jalan Hale),
> 30000 Ipoh.
>
> Dear Sirs,
>
> **Re: Tapah Estate H.S.(D) B.P. 56/81 Lot 6399 in the Mukim & District of Batang Padang**
>
> We refer to your letter dated 31st July, 1986.

Our client has instructed us to inform you that he expressly by the agreement purchased a piece of land measuring 5.5 acres. Our client needs for his purposes a minimum of 5.5 acres and not 4.28 acres as now offered by your clients in clear breach of the agreement. As the other piece of 1.22 acres is in a different lot our client is definitely not agreeable to take two pieces in different lots. As you state our client agreed to purchase 5.5. acres and not 4.28 acres in one lot and 1.22 acres in another.

As regards your para. 4 we are of the view that a reduction of 1.22 acres is a very substantial reduction and a piece of 4.28 acres will not serve our clients purpose for which the land was purchased.

As such our client is not interested to take the 4.28 acres offered by your client in breach of the agreement and there is no question at all of your client forfeiting the RM10,000. Instead our client reserves the right to sue your client for breach of contract and claim damages.

As instructed we hereby demand the refund of the sum of RM10,000 together with interest at the rate of 12% per annum from the date of receipt of the said sum by your client till realisation.

Your client is to take this as notice that if the said sum together with interest is not refunded within 14 days from date hereof we have instructions to commence legal proceedings against your client without any further reference.

On 29 August 1986, the vendor's solicitors replied as follows:

Messrs. Bachan & Kartar
Advocates and Solicitors
2nd Floor, 31, Station Road
30000 Ipoh

Dear Sirs,

Re: Tapah Estate H.S (D) B.P. 56/81 Lot 6399 in the Mukim District of Batang Padang

We acknowledge receipt of your letter of 8th instant, contents of which have been conveyed to our client.

We are pleased to inform you that our client has completed arrangements with A.M.S. Periasamy son of Suppiah Pillay to transfer direct to you the 5.5 acres of land which they have agreed to sell to you under the relevant agreement of sale and purchase.

In view of this, our client is now in a position to deliver to your client a valid and registrable transfer in respect of the sale to your client of the 5.5 acres of land.

> Our client now instructs us to and we do hereby give you notice to pay up to us as solicitors for our client the balance of the purchase price which has been deposited by your client to you since 3rd August 1983. If your client fails to pay up the balance of the purchase price within fourteen (14) days of the receipt of this letter, our client will have no alternative but to forfeit the deposit of RM10,000 paid under the relevant Agreement of Sale and Purchase.
>
> Upon receipt of this sum, we undertake to deliver to you the title deed and a valid and registrable transfer for execution by your client.

On 28 April 1989, the appellant obtained an *ex parte* order extending the caveat pursuant to the provision of s. 326(2) of the National Land Code ('the Code'). Nothing else happened until 28 August 1995 when the appellant filed his writ for specific performance and ancillary relief.

On 29 September 1995, the respondent, as registered proprietor, applied to remove the caveat. On 30 August 1996, the learned Judge who heard the application made an order in terms of it and directed the removal of the caveat.

His reasons appear sufficiently in his written judgment and may be summarised as follows:

(1) The appellant had no caveatable interest in the land having given up his rights by electing to rescind the sale and purchase agreement by way of his letter dated 8 August 1986;

(2) The appellant had not acted timeously in enforcing his claim by way of an action in Court.

I will take each of these grounds, and the arguments addressed in respect of each of them, separately.

At the heart of this appeal lies the question, whether the appellant has a claim to the title of the land in question. The learned Judge answered this question against the appellant. He held that the effect of the appellant's letter of 8 August 1986 was an unequivocal abandonment of any interest in the land. Having read that letter very carefully, I must express my agreement with the conclusion reached by the learned Judge on the point.

When the vendor's solicitors stated in their letter of 31 July 1986 their client's inability to convey 5.5 acres of the land to the appellant, there was a clear breach of the terms of the sale and purchase agreement. Once he received that intimation, the appellant had at least two alternatives open to him. These alternatives appear in s. 40 of the Contracts Act 1950 which is in the following terms:

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

The other way of stating the rule is this. An innocent party against whom a contract is repudiated may either accept the repudiation and sue for damages or he may treat the contract as continuing, and sue for specific performance.

There is, in my judgment, yet a third option available to the innocent party. It is the common law right of rescission, akin to but much narrower than its equitable counterpart. In the present case the appellant clearly made his election to rescind the sale and purchase agreement. Hence his demand for the return of the RM10,000. What he was in fact asking was a restoration of the *status quo ante*.

Having made this choice, he is bound by it. That much is clear from the judgment of Mason J (later CJ Australia) in *Sargent v. A.S.L. Developments Ltd.* [1974] 131 CLR 634, 655 where he said:

> It will make for greater certainty, therefore, if the present cases are regarded as cases of election. A person is said to have a right of election when events occur which enable him to exercise alternative and inconsistent rights, ie, when he has the right to determine an estate or terminate a contract for breach of covenant or contract and the alternative right to insist on the continuation of the estate or the performance of the contract. It matters not whether the right to terminate the contract is conferred by the contract or arises at common law for fundamental breach – in each instance the alternative right to insist on performance creates a right of election.
>
> Essential to the making of an election is communication to the party affected by words or conduct of the choice thereby made and it is accepted that once an election is made it cannot be retracted (*R. v. Paulson* [1921] 1 AC 271, 284; *Tropical Traders Ltd. v. Goonan* [1964] 111 CLR 41, 55). No doubt this rule has been adopted in the interests of certainty and because it has been thought to be fair as between the parties that the person affected is entitled to know where he stands and that the person electing should not have the opportunity of changing his election and subjecting his adversary to different obligations.

Later, his Honour said (at p. 658):

> For my part this proposition correctly states the law in its application to contracts as well as interests in property. If a party to a contract, aware of a breach going to the root of the contract, or of other circumstances entitling him to terminate the contract, though unaware of the existence of the right to terminate the contract, exercises rights under the contract, he must be held to

> have made a binding election to affirm. Such conduct is justifiable only on the footing that an election has been made to affirm the contract; the conduct is adverse to the other party and may therefore be considered unequivocal in its effect. The justification for imputing to the affirming party a binding election in these circumstance, though he be unaware of his alternative right, is that, having a knowledge of the facts sufficient to alert him to the possibility of the existence of his alternative right, he has acted adversely to the other party and that, by so doing, he has induced the other party to believe that performance of the contract is insisted upon. It is with these considerations in mind that the law attributes to the party the making of a choice, though he be ignorant of his alternative right. For reasons stated earlier the affirming party cannot be permitted to change his position once he has elected.

In my judgment, the principles stated by Mason J apply with full force to the appellant's case. Having taken the stand that he did by his letter of 8 August 1986, he now cannot detract. His claim, if any, is confined to the recovery of the deposit he had paid and not to the land he had agreed to purchase. The learned Judge was therefore quite right in holding that there was no caveatable interest within s. 323 of the Code.

With that, I now turn to the second ground.

It is well settled that a caveat acts as a statutory injunction which fetters a registered proprietor from dealing with his property and exercising all the rights conferred upon him by the Code. Because of its far reaching effect, it is vital that claims made by a caveator are enforced by action without undue delay.

Lord Diplock in *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212, 215 put the matter in this way:

> ... once the caveatee has met the first requirement of satisfying the Court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence **until proceedings brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges had been tried.** (Emphasis added.)

An illustration of the application of this principle is to be found in the case of *Teo Ai Choo v. Leong Sze Hian* [1982] 2 MLJ 12 where Sinnathuray J directed the removal of a caveat because of a delay of eleven months during which period no action had been filed. I emphasise the fact that delay was the sole reason for the removal of caveat in that case.

Mr. Bachan Singh has argued that the delay in the present case was only a few months because time began to run only after his client discovered from a reading of the vendor's affidavit in the present case that the land had been

resold to a third party. With respect, I am unable to agree with Counsel. Once the vendor had signified on 31 July 1986 that he was not in a position to honour the agreement, the appellant's rights crystallised in the sense of the election he was entitled to make. A reasonable man reading the appellant's letter of 8 August 1986, to which reference has already been made, would be left with the impression that the appellant was no longer interested in the land and that the vendor was at liberty to dispose of it as he thought fit. Time should therefore, be determined from 8 August 1986 and not the later date suggested by Counsel.

Whether a caveat ought to remain or ought to be removed involves the exercise of discretion by the Judge hearing an application under s. 327 of the Code. Particular attention should be paid to the words "may make such order on the application as it may think just" that appear in the section. These words make it clear that a Court hearing an application to remove a caveat is very much concerned with the justice of the case. The process involves a balancing of competing considerations and an evaluation of the evidence and, the facts of each particular case until the balance conclusively shifts in one direction or the other.

After hearing the appellant's argument, I am left unconvinced that discretion was wrongly exercised by the Judge in this case. In all appeals against exercise of discretion, the initial role of this Court is one of review only. The burden lies upon the appellant to demonstrate convincingly that the Judge to whom the law entrusts the primary exercise of the discretion has erred in principle or has taken into account or failed to take into account relevant considerations or has asked himself the wrong question.

This burden, the appellant before us, has, in my judgment, failed to discharge. This Court has therefore no independent discretion to exercise. Even if I, sitting as the trial Judge may have exercised discretion differently than has been done in the present instance, yet I will not be entitled to intervene. But, as it happens, in the present case, I am entirely satisfied the learned Judge correctly exercised his discretion.

For these reasons, I would dismiss the appeal with costs and affirm the order of the learned Judge.

Abu Mansor Ali JCA:

I agree with the judgment of my learned brother Gopal Sri Ram, JCA. For the reasons given by him, I too would dismiss this appeal.

Denis Ong JCA:

I concur and have nothing to add.

Reported by Gan Peng Chiang